# No. 13,097

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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CHARLES A. CRISPIN and ALMA B. CRISPIN,

*Appellants,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

**On Appeal from the United States District Court for the Northern District of California.**

## BRIEF FOR THE UNITED STATES.

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### OPINION BELOW.

The District Court made findings of fact and conclusions of law. (R. 10-14.) Its memorandum opinion (R. 6-10) is reported at 97 F. Supp. 93.

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### JURISDICTION.

This appeal involves federal income taxes for the years 1943 and 1944 in the total amount of $614.77 plus interest. The taxes in controversy for both taxable periods were paid to the Collector of Internal Revenue

for the First Collection District of California. (R. 12-13.) After receipt of a claim for refund for the year 1943 the sum of $261.64 plus interest of $56.95 was refunded to the taxpayers by the Collector on October 13, 1947. (R. 12.) Similarly, upon the receipt of a claim for refund for 1944 refund was made to the taxpayers by the Collector on February 11, 1948, in the amount of $251.34 plus interest of $45.24. (R. 13.)

Within the period of the statute of limitation as provided in Section 3746(b) of the Internal Revenue Code and on October 13, 1949, this action for erroneous refund was instituted by filing a complaint (R. 3-5, 13) in the District Court of the United States for the Northern District of California. The action was authorized by the Commissioner of Internal Revenue and directed to be brought by the Attorney General under Code Sections 3740 and 3746(b). (R. 11.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1345.

Judgment was entered for the United States on June 19, 1951. (R. 15-16.) Within sixty days and on August 15, 1951, a notice of appeal was filed. (R. 16.) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1291.

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## QUESTION PRESENTED.

Whether the District Court correctly held that in determining how much of the payments under taxpayer's annuity contract was taxable to him in each of the years 1943 and 1944, the $30,631.68 which had

been paid by his employer for the contract was not to be treated as "consideration paid" for the annuity within the meaning of the three percent rule provided in Code Section 22(b)(2)(A).

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**STATUTES AND REGULATIONS INVOLVED.**

These appear in the Appendix, *infra.*

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**STATEMENT.**

The facts found by the District Court (R. 10-13) may be summarized as follows:

Charles A. Crispin, hereinafter referred to as the taxpayer,[1] was employed by Standard-Vacuum Oil Company from 1930 to 1941 and resided continuously in China during this period. (R. 11.)

Taxpayer participated in a group annuity plan whereby both employer and employee made contributions to the Metropolitan Life Insurance Company. (R. 11.) Taxpayer contributed $2,156 toward the cost of the annuity; the employer contributed $30,631.68. Both taxpayer's and the employer's contributions were made over a period of years. (R. 11.)

Taxpayer's rights to the annuity became fixed and nonforfeitable on September 17, 1940, when he became eligible to retire. Annuity payments under the contract were to begin as soon after the certificate anniversary

[1]Alma B. Crispin, taxpayer's wife, is a party because joint returns were filed. For convenience future reference will be made only to Charles.

(October 1, 1940) as taxpayer actually retired. He actually retired on January 1, 1941, having returned to the United States on December 10, 1940. (R. 11-12.)

Taxpayer received pursuant to the terms of the annuity agreement the sum of $2,869.32 in each of the years 1943 and 1944. (R. 12-13.)

The District Court held, in giving judgment for the United States, that the cost of the annuity to the taxpayer was limited to his actual contribution of $2,156 and that the sums paid by his employer for the annuity were not a part of the cost to the taxpayer which he was entitled to get back tax exempt under Section 22(b)(2)(A) of the Code. (R. 13-14.)

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**SUMMARY OF ARGUMENT.**

Section 22(b)(2)(A) of the Internal Revenue Code provides that payments under annuities are taxable to the annuitant except that there shall be excluded (subject to the three percent rule) the consideration paid for the annuity. The decided cases and the Committee Reports make clear that the purpose of the exception is to permit the taxpayer to recover his cost tax free and accordingly the consideration excluded must be limited to taxpayer's own contribution.

Because, however, in some circumstances the amount of an employer's contribution to an annuity is taxable income to the annuitant in the year of the contribution, the exception in Section 22(b)(2)(A) has been extended by judicial interpretation to permit

the recovery, tax free, of the amount of the employer's contribution *on which a tax has actually been paid.* This was both an appropriate and a necessary device. It was necessary to avoid double taxation. It was appropriate to effectuate the purpose of the exception in Section 22(b)(2)(A) which as we have seen is to permit an annuitant to recover his cost, free of additional taxes. To the extent that another's contribution had already been taxed to the annuitant, the contribution taxwise was a part of his cost, and should be capitalized in the same manner as taxpayer's own contribution.

Taxpayer's attempt to invoke this principle on the theory that the employer's total contribution of $30,631.68 made over many years became "income" of the taxpayer in 1940 when the annuity contract first became nonforfeitable misconceives the principle, even if it be assumed that the $30,631 could have been taxed to him had he been a resident. In 1940 taxpayer was a nonresident of the United States and was, therefore, exempt from tax under Section 116(a). Accordingly he did not pay a tax on the $30,631.68 and the amount of the employer's contribution did not become a part of either his actual, or tax cost. There is, therefore, no basis in the statute or in the decisions to permit him to recover tax free, as his cost, an item which in fact was not his cost.

Approval of taxpayer's position would incongruously serve to exempt completely from tax on the basis of a rule of law intended merely to avoid double taxation.

## ARGUMENT.

### TAXPAYER WAS NOT ENTITLED TO EXCLUDE FROM TAXABLE INCOME THAT PORTION OF THE ANNUITY PAYMENTS REPRESENTING AN AMOUNT EQUAL TO HIS EMPLOYER'S CONTRIBUTIONS TO THE COST OF THE ANNUITY CONTRACT BECAUSE THOSE CONTRIBUTIONS, ADMITTEDLY NEVER HAVING BEEN TAXED TO THE TAXPAYER, WERE NOT A PART OF HIS COST.

Section 22(b)(2)(A) of the Internal Revenue Code (Appendix, *infra*) states the general rule that "Amounts received as an annuity under an annuity or endowment contract shall be included in gross income * * *." It provides, as an express exception, that there shall be excluded from gross income the excess of the amount received over an amount equal to three percent of the "consideration paid for such annuity * * * until the aggregate amount excluded * * * equals the aggregate premiums or consideration paid for such annuity." The purpose of the exception is to permit a taxpayer to recoup his cost of the annuity tax free to avoid taxing him on a return of his capital. In doing so, however, Congress recognized that a portion of the payments made each year pursuant to an annuity contract represented increment. Accordingly the rule was adopted that only the excess of the amount over an amount equal to three percent of the consideration paid was to be excluded from income until the total consideration was recovered. See *Manne v. Commissioner,* 155 F. 2d 304, 306 (C.A. 8th); H. Rep. No. 704, 73d Cong., 2d Sess., p. 21 (1939-1 Cum. Bull. (Part 2) 554, 569-570); S. Rep. No. 558, 73d Cong., 2d Sess., p. 23 (1939-1 Cum. Bull. (Part 2) 586, 604); H. Conference Rept.

No. 1385, 73d Cong., 2d Sess., p. 3 (1939-1 Cum. Bull. (Part 2) 627, 628).

The effect of this provision, of course, was to include in income each year three percent of the taxpayer's cost excluding the rest of the annuity payments until the cost was recovered at which time all of the annuity would be taxable. Although, as stated, the self-evident purpose of the tax treatment of annuities in Section 22(b)(2)(A) was to permit the taxpayer to recoup his cost, taxpayers nevertheless argued that the language contained in Section 22(b)(2)-(A) was not by its terms limited to consideration paid *by the taxpayer* and, accordingly, approval was sought of the position that they were entitled to recover tax free the total consideration paid for the annuity whether by themselves or by an employer. The result of approval of that position, of course, would be to permit a taxpayer to receive income tax free which never had been taxed and never would be.

There is no reason here, in view of the consistent rejection of this self-evidently unsound position by the Courts, to again explain in the fullest detail why this position is untenable. Suffice it to point out that whenever the question has been before the Courts it has been held that the consideration paid for an annuity which one is entitled to recover tax free (subject to the three percent rule) is only the consideration paid by, or cost to, the taxpayer.[2] *Wolfe v. Commis-*

[2]Taxpayer's contributions to his annuity totalling $2,156 have been excluded from gross income by the Commissioner. (R. 6-7.) The controversy here is over whether taxpayer may also exclude subject to the three percent rule the $30,631.68 contributed by his employer (R. 6) and on which he has never paid an income tax.

*sioner,* 8 T.C. 689, 700-701, affirmed *per curiam,* 170 F. 2d 73 (C.A. 9th), certiorari denied, 336 U.S. 914; *Hackett v. Commissioner,* 159 F. 2d 121, 124 (C.A. 1st); *Jones v. Commissioner,* 2 T.C. 924, 933.[3]

The general rule that annuities are taxable, expressly written into Section 22(b)(2)(A), confirmed the rule that would obtain anyway, that annuities paid to employees for past services constitute compensation for personal services and as such are taxable income. *Noel v. Parrott,* 15 F. 2d 669 (C.A. 4th), certiorari denied, 273 U.S. 754; *Old Colony Tr. Co. v. Commissioner,* 279 U.S. 716; *Lucas v. Ox Fibre Brush Co.,* 281 U.S. 115; *Commissioner v. Bonwit,* 87 F. 2d 764 (C.A. 2nd), certiorari denied, 302 U.S. 694. The interpretation of the exception to the Congressional decision to tax annuities, as applying only to permitting recoupment of the annuity's cost to the taxpayer, is confirmed not only by common sense and all of the cases to consider the question but by the Committee Reports. For example, in H. Rep. No. 704, *supra,* pp. 569-470, the Ways and Means Committee said:

> The change [addition of the three percent clause] *continues the policy* of permitting the annuitant to recoup *his original cost tax free* but requires him to include in his gross income a portion of

[3]Although the *Jones* case was a Tax Court decision it has been recognized as peculiarly authoritative. It was not only a unanimous decision of the full Tax Court, but notwithstanding the large amount involved no appeal was taken. The court below justifiably placed full reliance upon it particularly in view of the fact that the same annuity plan as we have here was there involved. The case is undistinguishable from the instant one. Taxpayer's labored effort to avoid its impact (Br. 16-19) is a position apparently born of desperation. In any event the assertion that the issue here was "neither argued nor decided" there is not true.

> the annual payments in an amount equal to three percent of the cost of the annuity. * * * [Italics supplied.]

After some administrative indecision[4] the Commissioner ultimately took the position that, under certain circumstances, contributions by an *employer* to an employee's annuity contract would be taxable income to the employee in the year when the contribution was made. This result was approved by such decisions as *Hackett v. Commissioner, supra; Hubbell v. Commissioner,* 150 F. 2d 516 (C.A. 6th); *Oberwinder v. Commissioner,* 147 F. 2d 255 (C.A. 8th); *Brodie v. Commissioner,* 1 T.C. 275; *Deupree v. Commissioner,* 1 T.C. 113; *Ward v. Commissioner,* 159 F. 2d 502 (C.A. 2d); *United States v. Drescher,* 179 F. 2d 863 (C.A. 2d). In those cases such as this where the employee was not taxed when the contributions were made, the annuity payments when received by the employee constituted his income insofar as it exceeded his own contributions. *Wolfe v. Commissioner, supra; Jones v. Commissioner, supra;* and see *Hackett v. Commissioner, supra.*

But a different problem arose in those cases where the employee had already been taxed on his employer's contributions. Obviously to tax him again when he received the annuity payments themselves would constitute a double tax unless the amount on which

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[4]See, e.g., I.T. 1810, II-2 Cum. Bull. 70 (1923); I.T. 2874, XIV-1 Cum. Bull. 49 (1935); I.T. 2891, XIV-1 Cum. Bull. 50 (1935); I.T. 2984, XV-1 Cum. Bull. 87 (1936); I.T. 3292, 1939-1 Cum. Bull. 84; I.T. 3346, 1940-1 Cum. Bull. 62.

he had previously paid a tax were excluded from income in the same manner as we have seen was done with his own contributions. This is exactly the approach which the Courts have adopted in attempting to reach a just result in this field. Thus in *Jones v. Commissioner, supra,* we find the Tax Court stating (p. 934) that—

> Congress intended to limit the deduction under section 22(b)(2) [now 22(b)(2)(A)], *supra,* to the aggregate premiums or consideration paid by the annuitant except where, as in the *Deupree* and *Brodie* cases, *supra,* the annuitant has been in receipt of taxable income in the year in which the annuity was purchased for him by his employer.

This, the Tax Court pointed out, was in accord with the general rule under the Revenue Acts with respect to basis under Sections 111 and 113 and depreciation and depletion under Section 23(l) and (m). The firmly entrenched principle is that to the extent the employer's contributions have been actually taxed to the annuitant those contributions entered into his tax cost—i.e., taxwise the employer's contributions were to be capitalized by the taxpayer-annuitant—and he is entitled to recover them tax free.

This rule of the *Jones* case was expressly approved by the Court of Appeals for the First Circuit in *Hackett v. Commissioner, supra.* There the taxpayer was attempting to resist a tax imposed on the amount of the employer's contribution to the taxpayer's annuity in the year when the contribution was made,

on the ground that it was properly taxed under Section 22(b)(2)(A) only when the annuity payments were actually made to the taxpayer. In order to deal with this contention the Court was faced with the problem of deciding whether the annuity payments when received in later years would be taxable. It concluded, relying on the Tax Court's decision in the *Jones* case (p. 124) that "we believe that a construction 'paid by the annuitant or by another when such payment is *taxable* income to the annuitant' would be entirely proper." (Italics supplied.)

The next—and only other case to our knowledge—to consider the problem here presented was this Court's decision in *Wolfe v. Commissioner, supra.* As noted, *supra,* this Court affirmed the Tax Court's decision *per curiam* without opinion. This undoubtedly is indicative of how clearly correct this Court viewed the Tax Court's decision. The alternative ground for decision in that case squarely presents the identical issue here raised.[5] Although the Tax Court had also decided that the amounts received by the taxpayer were not received under an annuity contract it is clear that beginning with the last paragraph on page 700 and continuing through the first full paragraph on page 701 the Court was also deciding alternatively that even if the payments were annuity payments they were taxable because they represented a recovery

[5]Taxpayer deals with this case only with the inaccurate footnote comment (Br. 14) that "this case did not deal with annuity contracts but involved a funded but apparently revocable promise of the employer. It is therefore inapposite here."

of consideration paid by the employer on which no tax was paid since the taxpayer was a nonresident of the United States and exempt under Section 116(a) of the Code at the time of the employer's contribution. The Tax Court pointed out that only the aggregate premiums or considerations paid by the annuitant can be recovered tax free except where, as in situations like *Deupree* and *Brodie,* the taxpayer has actually paid a tax, or in the Tax Court's language, "been in receipt of taxable income in the year in which the annuity was purchased for him by his employer."

It is apparent, then, from the self-evident purpose of Section 22(b)(2)(A), as disclosed by its language and confirmed by its legislative history and as interpreted by every Court to have considered the question, that annuity payments are fully taxable in the year when received except insofar as they represent a return of the taxpayer's cost. Cost may be of two types: (1) Actual consideration paid by the annuitant and (2) the consideration paid by his employer, on which the taxpayer has paid the tax. In this posture of the authorities taxpayer's detailed argument (Br. 5-20) that the employer's contribution to taxpayer's annuity contract totalling $30,631.68 made over a period of many years became "income" to the taxpayer in 1940 when the contract became nonforfeitable by reason of the taxpayer's having reached retirement age, although not in fact taxable because exempt under Code Section 116(a), is quite irrelevant here, even if otherwise accurate.

Assuming that he is correct in his highly theoretical argument that the contributions by an employer covering a lifetime of employment may be taxed to an employee all in one year even though the tax might exceed by many times his cash income for the year out of which the tax must be paid, it must be noted that no reported case has ever gone so far and to our knowledge the Commissioner has never asserted such a position.[6] But whether the theoretical proposition

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[6]It should be noted in this connection that in Section 22(b)(2)(B) (Appendix, *infra*) Congress provided for years beginning after December 31, 1941 (Section 162(d), Revenue Act of 1942 (Appendix, *infra*)), that in the sentence beginning "In all other cases * * *" (describing the situation here) that only employer's contributions made "on or after such rights [employee's] become nonforfeitable shall be included in the income of the employee in the year in which the amount is contributed * * *." It is further provided that only such amounts shall constitute "consideration paid for the annuity contract" under Section 22(b)(2)(A). These provisions clearly require the nontaxability of the employer's contributions in 1940 even had taxpayer been a resident and the resultant taxation of those contributions when received in the form of annuity payments. That this is so is made explicit by Treasury Regulations 111, Section 29.22(b)(2)-5 (Appendix, *infra*) as follows:

> If the employee's rights under the annuity contract in such a case were forfeitable at the time the employer's contribution was made for the annuity contract, *even though they become nonforfeitable later,* the amount of such contribution is not required to be included in the income of the employee, *but any amount received or made available to the employee under the annuity contract shall be includible in the gross income of the employee in the taxable year in which received or made available,* except that if the employee contributed any of the consideration for the annuity, the annuity shall be included in his income to the extent provided in section 29. 22(b)(2)-2. [Italics supplied.]

Whether or not Section 22(b)(2)(B) is otherwise applicable here it is plain that taxpayer's assertion (Br. 5) that the section has no application where the employer's contribution was not deductible under Section 23(p)(1)(B) is simply not so. Since the years involved here are 1943 and 1944 and the section was made effective as of December 31, 1941 (Section 162(d), *supra*), it would seem

be sound or not, it has been authoritatively said that taxation is an "eminently practical matter." *Tyler v. Commissioner,* 281 U.S. 497, 503; *United States v. Jacobs,* 306 U.S. 363, 370. In view of the purpose of Section 22(b)(2)(A) to tax annuity payments as income except insofar as they represent the taxpayer's cost, it is of no moment that the employer's contributions might have been taxed had taxpayer been someone else and lived in the United States. In that supposititious event the employer's contributions taxwise would have been part of taxpayer's cost of the annuity. But the theoretical taxability of the contributions not in fact taxed because of Section 116(a) cannot conceivably in fact affect taxpayer's basis in the annuity. Yet that is the only relevant inquiry.

Taxpayer's assumption that taxing the annuity payments to him after he became a resident takes away part of the immunity granted to him under Section 22(a) as a nonresident (Br. 20-22) has no merit. He assumes, contrary to the statute, that an annuity contract is capital. We have already seen that annuity payments insofar as they exceed a taxpayer's actual cost are income by express provision of the Code.

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to apply. But whether strictly applicable or not it seems probable that the nonpension trust provisions of Section 22(b)(2)(B) on which we rely were only declaratory of the old law under Section 22(b)(2)(A) contrary to taxpayer's assertion (Br. 5) and on the basis of the authority which he incorrectly cites for the contrary proposition. *Hackett v. Commissioner,* 159 F. 2d 121, 125 (C.A. 1st). As the court there accurately observed the nonretroactivity of Section 22(b)(2)(B) was obviously directed to the amendments made to Section 165 and Section 23(p) "and thus need not be interpreted as indicative of an intent to change that part of § 22(b)(2) on which our attention is now focused."

Taxpayer raises no constitutional question concerning the propriety of the statutory classification nor could one properly be raised. The suggestion that the equitable administrative device of permitting a taxpayer to recoup tax free contributions of his employer on which he has already paid a tax applies equally to one who did not pay the tax is transparently without merit.

Our position in this respect finds direct support in an analogous line of cases. *Johnson v. Commissioner,* 162 F. 2d 844 (C.A. 5th); *Commissioner v. Farren,* 82 F. 2d 141 (C.A. 10th); *Larkin v. United States,* 78 F. 2d 951 (C.A. 8th). In the *Johnson* case the question was the amount of gain which the taxpayer realized on the sale of real estate. This in turn depended on what the basis of the real estate was to her. She had leased property under a long-term lease and the lessee at his expense had built a building. The lease was terminated in 1929 because of a breach by the lessee and the taxpayer got back both the land and the building. Although not clear at the time, it later became authoritatively established as the result of the decision in *Helvering v. Bruun,* 309 U.S. 461, that the fair market value of the building should have been reported by the taxpayer as her income in the year of termination of the lease. This she had not done. If she had paid the tax on the value of the building just as in the annuity situation here, her basis would have been augmented by the valuation of the building on which she had paid the tax. Her position that she

was nevertheless entitled to the stepped up basis on the sale of the building because in fact the fair market value was income although not in fact taxed is the identical argument made by the taxpayer here. The Fifth Circuit in rejecting taxpayer's contention stated (p. 846):

> Since the value was not then [1929 when the lease was terminated] or since taken into the *tax account as a capital investment,* there is no occasion to add it to the basis of the property when sold to avoid taxing it a second time. Justice has been done.

Similarly, in the situation before us the purpose of excluding the amount of the employer's contribution from annuity payments when received is merely to avoid taxing it a second time. When in fact no taxes have been paid regardless of whether as a theoretical matter income had arisen, there is not only to need to exclude the item from income in order to avoid a second tax but there is no capital tax account which would justify it.

*Larkin v. United States* and *Commissioner v. Farren, supra,* also fully support our position here. The cases are a little closer on the facts in that the question was the basis of stock which had been secured in the one case at a bargain purchase and in the other at no cash outlay at all, but both in consideration of services rendered. In both cases the law was that the value of the stock in excess of cost to the taxpayer should have reported as income in the year he got title to the stock. This had not been done but the tax-

payers were insisting on the stepped up basis, just as here, on the ground that because they had income in the earlier years their basis was increased. In both cases the respective Courts pointed out that the basis is increased only in recognition of the tax having actually been paid in order to avoid double taxation.

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**CONCLUSION.**

The decision of the District Court is correct and should be affirmed.

Dated, January 28, 1952.

Respectfully submitted,

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**(Appendix Follows.)**

# Appendix.

## Appendix

Internal Revenue Code:

SEC. 22. GROSS INCOME.

* * * * * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * * * *

(2) [Amended by Section 120(d) of the Revenue Act of 1942, c. 619, 56 Stat. 798.] *Annuities, etc.*—

(A) *In general.*—

* * * * * * *

Amounts received as an annuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity (whether or not paid during such year), until the aggregate amount excluded from gross income under this chapter or prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such annuity. * * *

(B) [Added by Section 162(c) of the Revenue Act of 1942, *supra*] *Employees' annuities.*—If an annuity contract is purchased by an employer for an employee under a plan with respect to which the employer's contribution is deductible under section 23(p) (1) (B), or if an annuity contract is purchased for an

employee by an employer exempt under section 101 (6), the employee shall include in his income the amounts received under such contract for the year received except that if the employee paid any of the consideration for the annuity, the annuity shall be included in his income as provided in subparagraph (A) of this paragraph, the consideration for such annuity being considered the amount contributed by the employee. In all other cases, if the employee's rights under the contract are nonforfeitable except for failure to pay future premiums, the amount contributed by the employer for such annuity contract on or after such rights become nonforfeitable shall be included in the income of the employee in the year in which the amount is contributed, which amount together with any amounts contributed by the employee shall constitute the consideration paid for the annuity contract in determining the amount of the annuity required to be included in the income of the employee under subparagraph (A) of this paragraph.

* * * * * * *

(26 U.S.C. 1946 ed., Sec. 22.)

Revenue Act of 1942, c. 619, 56 Stat. 798:

Sec. 162. Pension Trusts.

* * * * * * *

(d) *Taxable Years to Which Amendments Applicable.*—The amendments made by this section shall be applicable as to both the employer and employees only with respect to taxable years of the employer beginning after December 31, 1941, except that—

* * * * * * *

Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.22(b)(2)-2. *Annuities.*—Amounts received as an annuity under an annuity or endowment contract include amounts received in periodical installments, whether annually, semi-annually, quarterly, monthly, or otherwise, and whether for a fixed period, such as a term of years, or for an indefinite period, such as for life, or for life and a guaranteed fixed period, and which installments are payable or may be payable over a period longer than one year. Such portion of each installment payment of an annuity (where the whole payment is not required to be included in income under section 22(k)) shall be included in gross income as is not in excess of 3 percent of the aggregate premiums or consideration paid for such annuity, whether or not paid during the taxable year, divided by 12 and multiplied by the number of months in respect of which the installment is paid. As soon as the aggregate of the amounts received and excluded from gross income equals the aggregate premiums or consideration paid for such annuity, the entire amount received thereafter in each taxable year must be included in gross income. Annuities paid to retired employees pursuant to the Civil Service Retirement Act of May 29, 1930, 46 Stat. 468, 475, as amended (5 U.S.C., 1940 ed., ch. 14), are subject to section 22(b)(2), the aggregate premiums or consideration paid for such annuities being the total of the amounts previously withheld from the compensation of the employees.

* * * * * * *

Sec. 29.22(b)(2)-5. *Employees' Annuities.*—If an employer purchases an annuity contract on behalf of an employee, including a retired or former employee, under a plan with respect to which his contribution is deductible under section 23 (p)(1)(B) (see section 29.23(p)-9), the employee is not required to include such amount in his income in the taxable year during which such contribution is made. The amount received or made available to such employee under such annuity contract shall be included in gross income of the employee in the taxable year in which received or made available, except that if the employee contributed any of the consideration for the annuity, the annuity shall be included in his income as provided in section 29.22(b)(2)-2, the consideration for the annuity being considered the amount contributed by the employee. If an employer purchases an annuity contract which is not under a plan with respect to which his contribution is deductible under section 23(p)(1)(B), the amount of such contribution shall be included in the income of the employee in the taxable year during which such contribution is made, if the employee's rights under the annuity contract are nonforfeitable, except for failure to pay future premiums, at the time the contribution is made. In such case, the total amount of such contributions required to be included in the income of the employee together with any amounts contributed by him will constitute the consideration paid for the annuity contract in determining the amount of the annuity required to be included in the income of the employee under section

22(b)(2)(A). If the employee's rights under the annuity contract in such a case were forfeitable at the time the employer's contribution was made for the annuity contract, even though they become nonforfeitable later, the amount of such contribution is not required to be included in the income of the employee, but any amount received or made available to the employee under the annuity contract shall be includible in the gross income of the employee in the taxable year in which received or made available, except that if the employee contributed any of the consideration for the annuity, the annuity shall be included in his income to the extent provided in section 29.22(b)(2)-2. The fact that an employee may not live a sufficient length of time to enjoy any benefits under the annuity contract, or that no payments will be made under any circumstances to his estate or other beneficiary, will not make the annuity contract forfeitable.

* * * * * * *